

1 ROB BONTA
Attorney General of California
2 JEFFREY T. FISHER
Supervising Deputy Attorney General
3 ZEWUGEBERHAN DESTA
Deputy Attorney General
4 State Bar No. 271740
1515 Clay Street, 20th Floor
5 P.O. Box 70550
Oakland, CA 94612-0550
6 Telephone: (510) 879-0263
Fax: (510) 622-2270
7 E-mail: Zewugeberhan.Desta@doj.ca.gov
Attorneys for Defendants
8 *Allison, Broomfield, and Clark*

9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

13
14 **MICHAEL V. NICKERSON,**

15 Plaintiff,

16 v.

17 **RON BROOMFIELD, et al.,**

18 Defendants.

No. 5:20-cv-06326-EJD (PR)

**DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE IN SUPPORT OF
MOTION TO DISMISS AND FOR
SUMMARY JUDGMENT
(EXHAUSTION)**

Judge: The Honorable Edward J. Davila
Trial Date: Not Set
Action Filed: September 9, 2020

21 Defendants Allison, Broomfield, and Clark respectfully request that the Court take judicial
22 notice of Exhibits A–N attached to the Declaration of Zewugeberhan Desta in support of their
23 concurrently filed motion to dismiss and for summary judgment (exhaustion).

24 Under Federal Rule of Evidence 201, the Court may take judicial notice of undisputed
25 matters of public record, including documents on file in federal or state courts. *See* Fed. R. Evid.
26 § 201(d)-(e); *Bennett v. Medtronic, Inc.*, 285 F.3d 801, 803 n. 2 (9th Cir. 2002); *Rico v. Ducart*,
27 980 F.3d 1292, 1295 n.2 (9th Cir. 2020) (citing *Reyns' Pasta Bella, LLC v. Visa USA, Inc.*, 442
28 F.3d 741, 746 n.6 (9th Cir. 2006), and taking judicial notice of the *Coleman v. Newsom*, 2:90-cv-

0520-KJM, Special Master’s reports on Guard One protocols); *Blantz v. Cal. Dep’t of Corr. & Rehab.*, 727 F.3d 917, 927 n.9 (9th Cir. 2013) (taking judicial notice of *Plata* Receiver’s report and concluding that plaintiff failed to state plausible claim for relief against CCHCS medical director). Courts may also take judicial notice of documents “introduced to ‘indicate what was in the public realm at that time.’” *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 960 (9th Cir. 2010) (quoting *Premier Growth Fund v. Alliance Capital Mgmt.*, 435 F.3d 396, 401 n.15 (3rd Cir. 2006)).

Additionally, under Federal Rule of Evidence 201(b), this Court can take judicial notice of facts that are “capable of accurate and ready determination by resort to resources whose accuracy cannot reasonably be questioned.” *Jespersen v. Harrah’s Operating Co., Inc.*, 444 F.3d 1101, 1110 (9th Cir. 2006) (en banc). This includes official records of government agencies that are published to their websites. *Brown v. Valoff*, 422 F.3d 926, 931 n.7 (9th Cir. 2004); *Daniels-Hall v. National Educ. Ass’n*, 629 F.3d 992, 999 (9th Cir. 2010) (taking judicial notice of information compiled by government entities and made publicly available on their websites); *Uribe v. Perez*, No. 5:17-00558 CJC (ADS), 2020 WL 1318358, at *4 (C.D. Cal. Mar. 3, 2020) (taking judicial notice of data regarding norovirus published to the United States Center for Disease Control’s website), *report and recommendation adopted*, 2020 WL 1317727 (Mar. 20, 2020).

Defendants have given Plaintiff sufficient notice and have furnished the court with sufficient information to enable it to take judicial notice of the attached records, each of which is either a filing in a federal-court action, or an official action published on a state- or federal-government website. Therefore, Defendants request that the Court take judicial notice of the following records attached to the Declaration of Zewugeberhan Desta:

Exhibit A – Order Appointing a Receiver, *Plata v. Newsom*, Case No. 01-CV-01351-JST, ECF No. 473 (N.D. Cal., Feb. 14, 2006).

Exhibit B – *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, United States Centers for Disease Control and Prevention (updated May 7, 2020), downloaded from and available at <http://web.archive.org/web/20200527142847/https://www.cdc.gov/>

[coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#verbal-screening](https://www.cdcr.ca.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html#verbal-screening).¹

Exhibit C – CCHCS Guidelines for Achieving and Maintaining Social Distancing in California Prisons, issued by Receiver J. Clark Kelso on April 10, 2020. These guidelines are also extensively discussed in *Plata v. Newsom*, 445 F. Supp. 3d 557, 565-66 (N.D. Cal. 2020).

Exhibit D - CCHCS Guidelines for Achieving and Maintaining Social Distancing in California Prisons, issued by Receiver J. Clark Kelso on April 12, 2020. These guidelines are also extensively discussed in *Plata v. Newsom*, 445 F. Supp. 3d at 565-66.

Exhibit E – Excerpts from the Certified Transcript of Video Recording of California Senate Public Safety Committee July 1, 2020 Senate Hearing on COVID-19 in California State Prisons, published at <https://www.senate.ca.gov/media/senate-public-safety-committee-20200701/video>.

Exhibit F – Notice of Filing of Receiver’s Forty-Fifth Tri-Annual Report and Tri-Annual Report, *Plata v. Newsom*, No. 01-CV-01351-JST, ECF No. 3457 (N.D. Cal. Oct. 1, 2020).

Exhibit G – Joint Case Management Conference Statement, *Plata v. Newsom*, No. 01-CV-01351-JST, ECF No. 3328 (N.D. Cal. May 20, 2020).

Exhibit H – Reporter’s Transcript of Telephonic Proceedings, *Plata v. Newsom*, No. 01-CV-01351-JST, ECF No. 3334 (N.D. Cal. May 21, 2020).

Exhibit I – Joint Case Management Conference Statement, *Plata v. Newsom*, No. 01-CV-01351-JST, ECF No. 3332 (N.D. Cal. May 27, 2020).

Exhibit J – Joint Case Management Conference Statement, *Plata v. Newsom*, No. 01-CV-01351-JST, ECF No. 3345 (N.D. Cal. June 8, 2020).

Exhibit K – Joint Case Management Conference Statement, *Plata v. Newsom*, No. 01-CV-01351-JST, ECF No. 3356 (N.D. Cal. June 18, 2020).

Exhibit L – *COVID-19 Review Series, Part Three*, California Office of the Inspector General (Feb. 2021), downloaded from and available at <https://www.oig.ca.gov/wp-content/uploads/2021/02/OIG-COVID-19-Review-Series-Part-3---Transfer-of-Patients-from-CIM.pdf>.

Exhibit M – Advisory Opinion 20-04 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration Under the Act October 22, 2020, as Modified on October 23, 2020, published at <https://www.hhs.gov/guidance/document/advisory-opinion-20-04-public-readiness-and-emergency-preparedness-act-and-secretarys>.

¹ Although this webpage was obtained from the Wayback Machine, district courts have taken judicial notice of the content of webpages available through the Wayback Machine. See *Erickson v. Nebraska Machine Co.*, No. 15-cv-01147-JD, 2015 WL 4089849, at *1 n.1 (N.D. Cal. 2015) (citing to Fed. R. Evid. 201 and various district court opinions that have noticed websites obtained through the Wayback Machine under Fed. R. Evid. 201).

Exhibit N – *How COVID-19 Spreads*, United States Centers for Disease Control and Prevention (updated May 22, 2020), downloaded from and available at <https://web.archive.org/web/20200527234600/https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-covid-spreads.html>.

Dated: January 5, 2022

Respectfully Submitted,

ROB BONTA
Attorney General of California
JEFFREY T. FISHER
Supervising Deputy Attorney General

/s/ Zewugeberhan Desta
ZEWUGEBERHAN DESTA
Deputy Attorney General
Attorneys for Defendants

SF2021401876
91454254.docx